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Supreme Court, U.S.
FILED
AUG 17 2001
OFFICE OF THE CLERK

No. 00-1214

In The

Supreme Court of the United States

STATE OF ALABAMA,

Petitioner,

vs.

LEREED SHELTON,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Alabama

BRIEF OF RESPONDENT

WILLIAM H. MILLS
Counsel of Record
REDDEN, MILLS & CLARK
940 Regions Bank Building
417 North 20th Street
Birmingham, Alabama 35203
(205) 322-0457
Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

The Fourteenth Amendment provides:

. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process or law; nor deny any person within its jurisdiction the equal protection of the laws.

SUMMARY OF THE ARGUMENT

I. Before a defendant can receive a suspended sentence and probation under the law of Alabama and some other jurisdictions judgment and sentence must first be imposed. The judgment and sentence remain in effect in spite of the subsequent suspension of the sentence and probation. A suspended sentence after conviction is different from, and more onerous than, a pre-trial threat of imprisonment from a mere accusation before there is a conviction. Incarceration will follow if probation is revoked. A convicted defendant who receives a jail sentence which is suspended is sentenced to a term of imprisonment within the meaning of *Scott vs. Illinois*. Consequently, the Sixth Amendment right to counsel applies.

II. The Sixth Amendment right to counsel, as applied in *Argersinger vs. Hamlin* and *Scott vs. Illinois*, operates to prevent a deprivation of a person's liberty by insuring a fair trial in misdemeanor prosecutions. This protection applies to all State ordered deprivations of liberty. It is not confined to protection against physical restraint, which is only one form of deprivation of liberty. The imposition of a suspended sentence and probation following conviction of a crime, even if only for a misdemeanor, imposes upon a defendant onerous burdens which deprive a person of liberty. Restraints on many recognized liberties, including the rights to free speech, travel, association, employment of choice, and privacy, are universally recognized as proper conditions of probation. Since the sanction of probation is inherently a deprivation of liberty, the Sixth Amendment right to counsel should apply in cases where a defendant's liberty is deprived by a suspended sentence and probation the same as it applies where a defendant's liberty is deprived by a sentence of immediate incarceration.

III. A misdemeanant who receives a suspended sentence and probation is subject to having the probation revoked. Revocation of probation can, and usually does, result in incarceration. A probationer who is revoked and incarcerated suffers actual imprisonment. If an uncounseled misdemeanant can be sentenced to a suspended sentence and probation, and then revoked and incarcerated, the result is no different from that of an uncounseled misdemeanant who is convicted and immediately incarcerated. Both suffer actual imprisonment from an uncounseled conviction.

A substantial percentage of misdemeanor probationers are revoked and incarcerated. No rational basis exists for a distinction in the application of the Sixth Amendment's right of counsel to misdemeanants who are immediately incarcerated and those whose incarceration is delayed by a suspended sentence and probation that is subsequently revoked. To prevent this disparity in the benefit of Sixth Amendment rights the same rule with respect to right of counsel should apply to defendants convicted of misdemeanors and given suspended sentences and probation as applies to misdemeanants sentenced to immediate terms of incarceration.

IV. *Argersinger vs. Hamlin* and *Scott vs. Illinois* should be overruled to the extent that they do not extend the Sixth Amendment's right to counsel to all cases where a sentence of imprisonment is an authorized penalty. The effect of these decisions is to require an awkward and ethically questionable pre-judging by a trial judge of the factors which determine the degree and nature of the penalty for a misdemeanor conviction. Such a pre-judging necessarily detracts from the ability of a trial judge, who is usually the trier of fact in misdemeanor cases, to be an impartial trier of facts because making the assessments required by *Argersinger* means that the trial judge must acquire information in advance of trial about the nature of the defendant's conduct and the defendant's past record. Also, the practice of deciding in advance of trial about the bounds of punishment denies a trial judge the power to exercise judicial discretion in determining the degree of punishment appropriate for a particular offense after hearing the trial evidence regarding that offense. A more workable and consistent practice, which

would assure that no uncounseled defendants would be incarcerated, is to require counsel in all cases where a jail sentence is an authorized penalty.

V. Assuring a fair trial in criminal prosecutions has a financial cost. To assure that the adversary judicial system produces a fair result the public must bear that financial burden. The financial burden of providing counsel in misdemeanor prosecutions where a jail sentence is an authorized penalty has not proven to be intolerable. A great majority of the States now provide this service, which is a fair indication that the remaining States can also tolerate the additional cost this will entail.

ARGUMENT

Basing their position on *Argersinger vs. Hamlin*, 407 U.S. 25 (1972), *Scott vs. Illinois*, 440 U.S. 367 (1979), and *Nichols vs. United States*, 511 U.S. 738 (1994), the Petitioner and Amici aligned with it argue that the right of counsel guaranteed by the Sixth Amendment[1] does not apply to a person convicted of a misdemeanor and sentenced to a jail term which is subsequently suspended on the condition of probation. The Respondent submits that this position is (1) not supported by the *Argersinger*, *Scott*, and *Nichols* decisions, (2) will accomplish results that are

[1] The right of counsel when refered to in this brief will refer to the right of every defendant to be informed of this right as well as the right of indigents to appointed counsel. See *Carnley vs. Cochran*, 369 U.S. 506, 516-17 (1962).

inimical to *Argersinger* and *Scott*, and (3) is contrary to principles firmly established by this Court.

I. A SUSPENDED SENTENCE IS A SENTENCE TO A TERM OF IMPRISONMENT, NOT MERELY A THREAT OF IMPRISONMENT, WITHIN THE MEANING OF *SCOTT VS. ILLINOIS*.

The argument that a jail sentence for a misdemeanor which is subsequently suspended on the condition of probation is merely a threat of imprisonment, and not a sentence to a term of imprisonment which invokes the Sixth Amendment right to counsel described in *Scott vs. Illinois* and *Argersinger vs. Hamlin*, is grounded on a superficial analysis of those decisions which takes a restricted view of their rationale and stresses a literal reading of the term "actual imprisonment". This analysis also overlooks the procedure by which a defendant receives a suspended sentence and probation under Alabama law (and the law of other jurisdictions) and overlooks the full significance of a suspended sentence and probation following an adjudication of guilt.

Under Alabama law a court, upon a determination of guilt, must pronounce judgment against and sentence the defendant. See Ala.R.Crim.P. 26.2. It is only after judgment has been entered and a sentence imposed (which means a sentence of confinement if that is the sentence suspended) that a court is authorized to suspend the sentence and place the defendant on probation. See ALA.CODE § 15-22-50 (1975); Ala.R.Crim.P. App., Form 99 (" . . . has been convicted of ___ and has been sentenced to ___. It is hereby ordered that said sentence is

hereby suspended, and the defendant is placed on probation . . . ".). That was the procedure followed in Petitioner's case in the Alabama court (App.26). The laws of other jurisdictions establish similar procedures. See, e.g., GA. CODE ANN. § 17-10-1(a)(1) (1997); IND. CODE § 35-38-2.6-3 (1976); MASS. ANN. LAWS ch. 279 §§ 1, 1A (1991); MISS. CODE ANN. § 47-7-33 (1972); OHIO REV. CODE ANN. § 2929.51 (Baldwin 1953); OKLA. STAT. tit. 22, § 991(a) (1992); TENN. CODE ANN. §§ 40-20-101, 203, 210; § 40-35-303 (1955).

Under Alabama law the suspension of a sentence and the grant of probation does not operate to alter or set aside the judgment and sentence. Even with a suspension of the sentence and a grant of probation the judgment and sentence remain in full force and effect, and the defendant receives no credit on the suspended sentence for time served on probation if probation is revoked. See *Wray vs. State*, 472 So.2d 1119, 1121 (Ala. 1985); *Ex Parte Hutchison*, 264 Ala. 447, 87 So.2d 847, 850 (1956); *Hamilton vs. State*, 43 Ala. App. 192, 186 So.2d 108, 114 (1965); *Persall vs. State*, 31 Ala. App. 309, 16 So.2d 332, 334 (1944). The suspended sentence can be converted into incarceration by merely revoking probation.

The concept that a sentence though suspended remains a sentence to imprisonment has been recognized by a decision of this Court (which was rendered at a time when federal sentencing procedures were more like the present Alabama procedure). See *Roberts vs. United States*, 320 U.S. 264, 266 (1943) ("Neither probation nor suspension of execution rescinded the judgment sentencing petitioner to imprisonment . . . "). Other State courts have made similar pronouncements. See, e.g., *Sutton vs. State*,

191 N.E.2d 104, 106 (Ind. 1963); *State vs. Adape*, 14 Kan. App. 2d 521, 794 P.2d 672, 676 (1990); *Lyda vs. State*, 428 P.2d 347 (Okla. Crim. App. 1967). The concept under Alabama law is that a suspended sentence is still a sentence of imprisonment the probationer is merely serving outside the prison walls. See *Persall vs. State, supra*. The same idea was described by this Court in *Morrissey vs. Brewer*, 408 U.S. 471, 477 (1972) where parole, a similar arrangement to probation with a suspended sentence, was referred to as a "variation on imprisonment."

Consequently, if we give full meaning to the words of the penultimate sentence of the majority opinion in the *Scott* case[2], sentencing under Alabama law to a jail term with a subsequent suspension of the sentence on the condition of probation is a sentence to a term of imprisonment.

Petitioner's argument that the *Scott* and *Nichols* cases make a distinction between incarceration and a mere "threat of incarceration" fails to appreciate the fact that the comparison referred to in those cases was in a different context. The threat of incarceration referred to in *Scott* and *Nichols* is the pre-trial potential of incarceration allowed by law for the offense charged *if* the defendant is convicted. There is a vast difference between the threat of incarceration facing an accused, who is presumed innocent, and what faces a defendant already convicted and

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[2] " . . . [T]he Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant *be sentenced to a term of imprisonment* unless the State has afforded him the right to assistance of appointed counsel in his defense." (Emphasis added).

under a suspended sentence. The "if convicted" condition has been removed. Only probation revocation (a subject more fully discussed in Part III of this brief), which is a thin reed as compared to the "if convicted" status, stands between the defendant and incarceration. The argument which seeks to equate the pre-trial threat and the post-conviction threat of incarceration should be rejected.

Well reasoned decisions of the Sixth Circuit, the Tenth Circuit, and the Supreme Court of Vermont have reached the conclusion that a suspended sentence is a sentence of imprisonment which invokes the right to counsel. See *United States vs. White*, 529 F.2d 1390, 1394 (8th Cir. 1976); *United States vs. Reilley*, 948 F.2d 648, 654 (10th Cir. 1991) ("If a defendant cannot be ordered to serve a sentence of imprisonment, it seems obvious that a conditional sentence of imprisonment is equally invalid"); *State vs. Brown*, 165 Vt. 79, 676 A.2d 350, 354 (1996). These decisions merit consideration as being instructive for this case.

The Petitioner's argument should, for the simple reason that a suspended jail sentence is a sentence to a term of imprisonment within the meaning of the *Argersinger* and *Scott* decisions, be rejected.

II. A SUSPENDED SENTENCE AND PROBATION IS A DEPRIVATION OF LIBERTY WHICH INVOKES THE CONSTITUTIONAL RIGHT TO COUNSEL.

The Petitioner's argument over emphasizes the significance of the term "actual imprisonment" from the *Scott* and *Argersinger* opinions. It projects "actual

imprisonment" as the only sanction with which the *Argersinger* and *Scott* cases are philosophically concerned in the context of the constitutional right to counsel. An argument cast in these terms misses the full meaning of the *Scott* and *Argersinger* decisions.

A. The *Argersinger* and *Scott* cases are concerned with all uncounseled convictions which result in deprivation of liberty, not solely with those which result in physical restraint.

The dominating theme and goal of *Argersinger* and *Scott* is protecting against an uncounseled conviction that leads to a "deprivation of liberty". This mission is not limited to merely preventing a deprivation of liberty by immediate incarceration. Neither the *Scott* nor *Argersinger* (nor *Nichols*) holds or infers that a suspended jail sentence and probation in a misdemeanor case does not invoke the right to counsel. It was not, of course, necessary to consider that issue in either case. *Argersinger* involved an immediate jail sentence and *Scott* and *Nichols* involved only a fine. Petitioner's argument seeks to extend *Scott* (and *Argersinger* and *Nichols*) beyond their peculiar facts without considering the full import of the constitutional objective those cases sought to accomplish.

Citing principles established by such landmark decisions as *Powell vs. Alabama*, 287 U.S. 45 (1932) and *Gideon vs. Wainwright*, 372 U.S. 335 (1963), both the *Argersinger* and the *Scott* opinions make it clear that the basic function of the Sixth Amendment's right to counsel is to guarantee a fair trial in criminal prosecutions in order to protect the constitutional right of every person to liberty.

The thrust of both decisions is that government may not deprive a person of liberty through the agency of a criminal conviction, even if the conviction is only of a misdemeanor, if that person did not have the benefit of counsel in the guilt adjudication process. See also *United States vs. Ash*, 413 U.S. 300, 309 (1973); *Michigan vs. Harvey*, 494 U.S. 344, 348 (1990); *Strickland vs. Washington*, 466 U.S. 668, 684-85 (1984).

The *Argersinger* opinion speaks often of the right to counsel being related to the circumstance "where an accused is deprived of his liberty". 407 U.S. at 32. It defines the scope of the Court's consideration in that case by excluding cases "where loss of liberty is not involved". 407 U.S. at 37. The *Argersinger* opinion quotes approvingly from *Stevenson vs. Holgman*, 254 Ore. 94, 102, 458 P.2d 414, 418 (1969), which stated: "We hold that no person may be deprived of his liberty who has been denied the assistance of counsel . . . " 407 U.S. 37-38. The concluding sentence of the *Argersinger* majority opinion stresses the deprivation of liberty theme with these words:

> But in those that end up in the actual *deprivation of a person's liberty*, the accused will receive the benefit of 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy. 407 U.S. at 40. [Emphasis added]

The *Scott* opinion quotes the last sentence from the *Argersinger* opinion set out above. 440 U.S. at 370. The *Scott* opinion further emphasizes the concept that the evil to be avoided is a deprivation of liberty without the assistance of counsel in a further reference to the *Argersinger* opinion:

> The Court in its opinion repeatedly referred to trials 'where an accused is deprived of his liberty,' id., at 32, and to 'a case that actually leads to imprisonment even for a brief period,' id., at 33. The Chief Justice in his opinion concurring in the result also observed that 'any deprivation of liberty is a serious matter' id., at 41.

The *Argersinger* and the *Scott* opinions can only be read as pronouncements on a broader concern than purely physical restraint by confinement – the concern that no defendant be deprived of liberty by a criminal conviction obtained in a proceeding where the defendant was not afforded the right to counsel. Actual imprisonment, or physical restraint, as the prior decisions of this Court discussed below make clear, is only one form of deprivation of liberty. Therefore, a core issue of the present case is whether a suspended jail sentence and the imposition of a term of probation is a deprivation of liberty. If it is, no apparent rationale exists for the constitutional right to counsel to be denied in such cases.

B. A suspended sentence on the condition of probation is a deprivation of liberty.

To fully appreciate the concept of "deprivation of liberty" it is instructive to first fully appreciate the concept of "liberty". *Webster* defines liberty as "the quality or state of being free", "freedom from usually external restraint or compulsion", "the power to do as one pleases", and "exemption from subjection to will of another". WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1303 (1971). Decisions of this Court have elaborated on the meaning of liberty as guaranteed by the

Constitution. In *Meyer vs. Nebraska*, 260 U.S. 390 (1923) this Court spoke of liberty in broad terms:

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of ones own conscience, and generally to enjoy those privileges long recognized by common law as essential to the orderly pursuit of happiness by free men.

260 U.S. at 399. In *Bolling vs. Sharpe*, 347 U.S. 497 (1954) this Court made it clear that liberty:

> . . . is not confined to mere freedom from bodily restraint. Liberty under the law extends to the full range of conduct which the individual is free to pursue . . .

347 U.S. at 499. The same idea that "liberty" is a broad right and is not confined to mere freedom from physical restraint can be found in other decisions. See, e.g., *Washington vs. Gluckenberg*, 521 U.S. 702, 719 (1997); *Michael H. vs. Gerald D.*, 491 U.S. 100, 121 (1989); *Board of Regents vs. Roth*, 408 U.S. 564, 572 (1972). When *Argersinger* and *Scott* spoke of "liberty" they undoubtedly were referring to the same concept as described and defined in these cases.

Decisions of this Court have also been specific in identifying the components of liberty. It has been made clear that the liberty guaranteed by the Constitution includes: the right to travel (see *Zemel vs. Rusk*, 381 U.S. 1, 14 [1965]; *Kent vs. Dulles*, 357 U.S. 116, 125-26 [1958]), the right of association (see *United States vs. Robel*, 389 U.S.

258, 262-63 [1967]; *Bates vs. Little Rock*, 361 U.S. 516, 522 [1960]; *N.A.A.C.P. vs. Alabama*, 357 U.S. 449, 460 [1958]), the right to choose and follow an occupation or profession (see *In Re: Griffiths*, 413 U.S. 717, 720 [1973]; *Allgeyer vs. Louisiana*, 165 U.S. 578, 589-90 [1897], the right of free speech (see *Hustler Magazine vs. Falwell*, 485 U.S. 46, 51 [1988]; *Consolidated Edison Company vs. Public Service Commission of New York*, 447 U.S. 530, 534 [1980]), and the right of privacy and freedom from governmental intrusion (see *Roe vs. Wade*, 410 U.S. 113, 152 [1973]; *Katz vs. United States*, 389 U.S. 347, 350 [1967]; *Elkins vs. United States*, 364 U.S. 206, 213 [1960]). Any restrictions on the exercise of any of these rights is obviously a deprivation of liberty.

A suspended sentence and the imposition of probation following a conviction unquestionably interferes with the "full range of conduct which the individual is free to pursue" and invariably operates to deprive a probationer of some of "those privileges long recognized by common law as essential to the orderly pursuit of happiness by free men.". This conclusion was pointedly recognized by this Court in *Griffin vs. Wisconsin*, 483 U.S. 868, 874 (1987) with the statement that probationers "do not enjoy 'the absolute liberty to which every citizen is entitled'." This is true from the moment probation is imposed.

A brief reference to some of the liberty-depriving consequences of probation that are permitted in the United States will further illustrate the conclusion that probation is destructive of liberty. A probationer's freedom of association can be impaired in that a probationer can be restricted from associating with or even contacting

certain persons. See, e.g., 18 U.S.C. § 3563(b)(6); *United States vs. Bortels*, 962 F.2d 558, 559-60 (6th Cir. 1992); *King vs. State*, 574 So.2d 1013, 1014 (Ala. Crim. App. 1990); *State vs. Nickerson*, 164 Ariz. 121, 791 P.2d 647, 649 (1990); *State vs. Davis*, 107 Idaho 215, 687 P.2d 998, 1000 (1984); *People vs. Kimbrell*, 291 Ill. App. 3d 605, 684 N.E.2d 443, 445 (1997); *People vs. DiStefano*, 550 N.Y.S.2d 989, 992 (1989). A probationer can be required to remain in a specified geographical area or to refrain from going into a specified geographical area, thereby restricting freedom of travel. See, e.g., 18 U.S.C. § 3563(b)(13), (14); *United States vs. Lowe*, 654 F.2d 562, 567 (9th Cir. 1981); *King vs. State*, 574 So.2d 1013, 1014 (Ala. Crim. App. 1990); *Weaver vs. State*, 515 So.2d 79, 82 (Ala. Crim. App. 1987); *Sherer vs. State*, 486 So.2d 1330, 1332-33 (Ala. Crim. App. 1986); *People vs. Brockelman*, 933 P.2d 1315, 1319-20 (Colo. 1997); *Edwards vs. State*, 173 Ga. App. 589, 327 S.E.2d 559, 561 (1985); *People vs. Pickens*, 186 Ill. App. 3d 456, 542 N.E.2d 1253, 1256 (1989); *Gibbons vs. State*, 775 S.W.2d 790, 795 (Tex. App. 1989). Most probationers are required to report as directed to a probation officer, a requirement that may affect the right to travel and which certainly affects the right to be free from external compulsion. See, e.g., 18 U.S.C. § 3563(b)(15); ALA. CODE § 15-22-52 (1975). A probationer may have restrictions placed on participation in political activities, which impairs free speech and expression. See *United States vs. Turner*, 44 F.3d 900, 903 (10th Cir. 1995); *Markley vs. State*, 507 So.2d 1043, 1050-52 (Ala. Crim. App. 1987); *Land vs. State*, 262 Ga. 898, 426 S.E.2d 370, 374 (1993); *Hoffart vs. State*, 686 S.W.2d 259, 264 (Tex. App. 1985). A probationer does not have the same right of privacy and freedom from unreasonable

searches as other persons. See *Griffin vs. Wisconsin, supra* at 874. In some jurisdictions a consent to a warrantless search is recognized as a proper condition for probation. See, e.g., *United States vs. Gordon*, 540 F.2d 452, 453 (9th Cir. 1976); *State vs. Turner*, 142 Ariz. 138, 688 P.2d 1030, 1036 (1984); *People vs. Mason*, 97 Cal. Rptr. 302, 488 P.2d 630, 632 (1971); *State vs. Josephson*, 125 Idaho 119, 867 P.2d. 993, 996 (1993). In this same vein, the federal probation statute requires a probationer to permit a probation officer to visit in the probationer's home and requires a probationer to answer any inquiries of a probation officer. See 18 U.S.C. § 73563(b)(16), (17). A probationer can be required to submit to a polygraph test. See, e.g., *People vs. Miller*, 256 Cal. Rptr. 587, 589 (Cal. App. 1989); *Mann vs. State*, 154 Ga. App. 677, 269 S.E.2d 863, 866 (1980). A probationer can be prohibited from engaging in a certain occupation or profession. See, e.g., 18 U.S.C. § 3563(b)(5); *United States vs. Brockway*, 769 F.2d 263, 265 (5th Cir. 1985); *United States vs. Tolla*, 781 F.2d 29, 34-35 (2nd Cir. 1986); *Berra vs. United States*, 221 F.2d 590, 598 (8th Cir. 1955); *Whaley vs. United States*, 324 F.2d 356, 359 (9th Cir. 1963). Probationers can be required to spend part of their time in custody. See, e.g., 18 U.S.C. § 3563(b)(10); *Bowers vs. State*, 565 So.2d 1203, 1205-06 (Ala. Crim. App. 1990); *People vs. Horton*, 628 P.2d 117, 119 (Colo. App. 1980); *State vs. Williamson*, 237 So.2d 69, 70 (Fla. App. 1970); *People vs. Simmons*, 35 Ill. App. 3d 627, 342 N.E.2d 187, 190 (1976). Probationers can be restricted in the use or consumption of alcoholic beverages. See, e.g., *Jent vs. State*, 495 So.2d 123, 126 (Ala. Crim. App. 1986); *State vs. Janise*, 116 Ariz. 557, 570 P.2d 499, 502 (1977); *People vs. Mitchell*, 178 Cal. Rptr. 188, 190, 125 Cal. App. 3d 715 (1981); *Upchurch vs. State*,

289 Minn. 520, 184 N.W.2d 607, 608 (1971). Probationers can be required to issue public apologies or do other things that call attention to their violation of the law. See, e.g., *United States vs. Clark*, 918 F.2d 843, 848 (9th Cir. 1990); *Lindsay vs. State*, 606 So.2d 652, 657-58 (Fla. App. 1992); *Ballenger vs. State*, 210 Ga. App. 627, 436 S.E.2d 793, 794-95 (1993). In Alabama the conditions of probation may be modified by a court without a hearing and without notice, a seemingly obvious due process denial. See Ala.R.Crim.P. 27.2; *Thomas vs. State*, 508 So.2d 310, 313-14 (Ala. Crim. App. 1987). While this list is not intended to be exhaustive, it serves to illustrate that a sentence of probation, from the time it is entered, is inherently a deprivation of a probationer's liberty. See *Frank vs. United States*, 395 U.S. 147, 154 (1969) (Warren, C.J., dissenting).

Further deprivations of liberty face a probationer who is accused of violating the terms of probation and threatened with revocation. These restrictions are more fully discussed in Part III of this brief.

A decision in this case should be a substantiation of the teachings of *Argersinger* and *Scott* that there can be no deprivation of liberty by a process that does not meet constitutional standards. The *Argersinger* and *Scott* cases inculcate that a suspended sentence and probation in a misdemeanor case, being a deprivation of the defendant's liberty, is a case that requires a defendant be afforded the right of counsel. The argument that a defendant in such circumstances has no right of counsel should be rejected.

III. A PROBATIONER WHO IS INCARCERATED TO SERVE A SUSPENDED SENTENCE FOLLOWING REVOCATION OF PROBATION SUFFERS ACTUAL IMPRISONMENT.

Even if it be conceded for purposes of argument that a suspended sentence and probation is not "actual imprisonment" or a "deprivation of liberty" when imposed, the Petitioner's argument for a rule that excludes misdemeanor defendants who receive such a penalty from the protection of the Sixth Amendment's right to counsel ignores the effect of such a rule where probation is revoked and a probationer incarcerated. The briefs of Petitioner and Amici aligned with it contain no reference to this aspect of the present issue. By ignoring this subject they tacitly argue that it is constitutionally permissible to incarcerate a revoked probationer even though no right of counsel was afforded before the probationer's guilt was established and a suspended sentence imposed. *Argersinger*, Petitioner submits, does not sanction uncounseled incarceration that is merely delayed.

The fact that a revoked and incarcerated probationer suffers actual imprisonment is, of course, obvious. The revoked probationer's imprisonment is no less "actual" or "real" than that of the defendant who is sentenced and immediately incarcerated.

Probation, must, of course, carry with it the authority of the granting court to revoke and incarcerate. Without such authority probation would be meaningless and ineffective. The reality of probation revocation, and its fairly high incidence, and the stark truth that for many defendants a suspended sentence and probation is only a way

station on the road to incarceration, compels a consideration of whether the rule advocated by the Petitioner can be squared with the standard of the *Scott* and *Argersinger* decisions – i.e., that no person convicted of a misdemeanor suffer imprisonment who is not afforded the right to counsel at trial.

A. Substantial numbers of misdemeanor probationers are incarcerated following revocation of probation.

The frequency and volume of incarcerations of misdemeanants upon revocation of probation is somewhat difficult to quantify because of lack of precise statistics. Available statistics and studies point to the certain conclusion that many misdemeanor probationers are revoked and incarcerated. The fact that many of these incarcerated probationers had no counsel at trial, especially in those jurisdictions that follow the rule advocated by the Petitioner, seems reasonably certain.

Statistics published by the United States Department of Justice show that in 1996-1999 time period the numbers of adults on probation in the United States were:

1996 – 3,164,996
1997 – 3,296,513
1998 – 3,670,591
1999 – 3,773,624

See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 484, U.S. DEPT. OF JUSTICE (1999). Press releases issued

by the Bureau of Justice Statistics of the Justice Department show that in these same years the following percentages of those probationers were on probation for non-felony offenses:

1996 – 45%
1997 – 46%
1998 – 43%
1999 – 48%

See Bureau of Justice Statistics, U.S. Dept. of Justice, Press Releases (August 18, 1997, August 16, 1998, August 22, 1999, July 23, 2000). These same press releases show that in these years the following numbers of probationers had their probation terminated for all reasons:

1996 – 1.5 million
1997 – 1.6 million
1998 – 1.5 million
1999 – 1.9 million

Of these terminated probationers the Justice Department press releases show the following percentages were terminated and reincarcerated for violating the conditions of probation:

1996 – 18% (or approximately 270,000)
1997 – 17% (or approximately 272,000)
1998 – 18% (or approximately 270,000)
1999 – 14% (or approximately 266,000)

Admittedly, these figures do not show the number or percentage of re-incarcerated misdemeanor probationers. However, statistics published by the Department of Justice for Federal probations for 1997 and 1998 show that about 30% of Federal misdemeanor probationers who were terminated in 1997 and about 20% of Federal misdemeanor probationers who were terminated in 1998 were

terminated for violation of probation conditions or new crimes.[3] See COMPENDIUM OF FEDERAL JUSTICE STATISTICS 81, U.S. DEPT. OF JUSTICE (1997); SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 494, U.S. DEPT. OF JUSTICE (1999). These statistics indicate that Federal misdemeanor probationers were re-incarcerated at a higher rate than probationers in general in these years. Even if the percentage of misdemeanant revocations for these years were the same as the misdemeanants' percentage of all probationers (i.e., 45%, 46%, 43% and 48%), the Justice Department figures indicate that for these four years well over 100,000 misdemeanor probationers were reincarcerated each year.

Published studies in professional journals indicate high revocation rates for probationers. A study published in *Corrections Compendium* of a survey of probationer recidivism in 79 counties in Michigan showed 47 percent of the probationers in that study who left probation had their probation revoked. See Maxwell, Bingham, Gray, Combs, *Examining Probationer Recidivism in Michigan*, CORRECTIONS COMPENDIUM (December 2000). This same study reports earlier studies where revocation rates ranged from 19 percent to 62 percent. A study published in the June 1993 edition of *Federal Probation* includes a review of the literature on the outcome of probation and concludes that failure rates (which should be a rough equivalent of revocation and re-incarceration) range from 14 percent to 51 percent. See Morgan, *Factors Influencing*

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[3] A new crime, being a violation of law, is a standard probation violation. See 18 U.S.C. § 3563(a)(1); *Wilcox vs. State*, 395 So.2d 1054, 1056 (Ala. 1981).

Probation Outcome: A Review of the Literature, FEDERAL PROBATION 23 (June 1993).

While these statistics and studies do not precisely identify the number or percentage of uncounseled misdemeanor probationers who are incarcerated upon revocation of probation, they do illustrate a problem of considerable magnitude. Obviously, a large number of probationers are incarcerated because their probation is revoked. It seems reasonably certain from available statistics that a large number of these revoked probationers are misdemeanor probationers. Under the rule advocated by the Petitioner, each of these revoked misdemeanor probationers could have been constitutionally convicted at a trial where no counsel was afforded. The incarceration of even one revoked misdemeanor probationer who was not afforded counsel at trial is a failure to meet the constitutional standard expressed in *Argersinger* and *Scott* that, absent a knowing and intelligent waiver, "no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial".

B. A suspended sentence and probation present a "practical possibility" of incarceration.

It is worth noting that the *Argersinger* opinion, while not explicitly dealing with the subject of suspended sentences and probation followed by revocation (those were not the facts of that case), does recognize (seemingly with approval) a generic event which would include a suspended sentence and probation that is subsequently revoked as presenting a circumstance where the right of counsel must be afforded. The opinion quotes at length

from the American Bar Association Project on Standards for Criminal Justice, which somewhat coincides with the ultimate ruling in *Argersinger*. Included in the quoted portions of the Standard is the Standard's own description of its dividing line between cases which warrant counsel and cases which do not warrant counsel:

> . . . it draws a categorical line at those types of offenses for which incarceration as a punishment is a *practical possibility*. (Emphasis added)

407 U.S. at 39.

Incarceration is certainly a "practical possibility" when there is a suspended jail sentence which can be made an actual jail sentence upon revocation of probation. Therefore, the American Bar Association Standard and the *Argersinger* opinion appear to recognize that counsel should be afforded where there is a suspended sentence which can become, through the "practical possibility" of probation revocation, incarceration.

C. Providing right to counsel will result in no constitutionally significant disparity between indigent and non-indigent misdemeanor defendants.

The argument in Amici's brief that affording counsel for suspended sentence cases will result in anomalous treatment of indigent and non-indigent defendants (Amici brief, p. 22 et seq.) dwells on an irrelevancy and misses the point of a much more significant anomaly that results from the position Amici advocate. The perceived disparity referred to in Amici's brief between the represented indigent and the unrepresented non-indigent who

chose to waive counsel has no constitutional implications. It is the result of free choice on the part of the non-indigent.

The disparity illustrated by the following scenario is not a result of free choice and does have constitutional implications: Prisoner A had counsel (either retained or appointed) at trial and was convicted of a misdemeanor and sentenced to a jail term and is serving it. Prisoner A's incarceration does not violate the *Argersinger-Scott* principle. Prisoner A's cell mate, Prisoner B, an indigent, was convicted of a similar misdemeanor at a trial with no counsel and was given a suspended sentence and probation. Subsequently, Prisoner B's probation was revoked and he was incarcerated to serve the previously suspended sentence. Both Prisoner A and Prisoner B are imprisoned, but Prisoner B's incarceration violates the *Argersinger-Scott* principle that no defendant be incarcerated who did not have the benefit of counsel at trial.

D. The failure to afford the right of counsel at trial to a convicted misdemeanant cannot be remedied by providing counsel at a probation revocation hearing.

The absence of counsel at trial (or plea) for the revoked probationer cannot be remedied by having counsel at a probation revocation hearing. First, it should be noted that the assurance of counsel at a probation revocation hearing is somewhat problematic under the present state of the law. See *Black vs. Romano*, 471 U.S. 606, 612 (1985); *Gagnon vs. Scarpelli*, 411 U.S. 778, 789, 790 (1973); *Byrd vs. State*, 717 So.2d 874, 875-76 (Ala. Crim. App.

1998). Even if counsel is provided at the revocation hearing, the probationer still has not had the benefit of the "guiding hand" of counsel at trial for the purpose of assuring a fair trial before conviction of the offense that will be the basis for incarceration upon revocation. See *Powell vs. Alabama*, 287 U.S. 45, 68-69 (1932); *Gideon vs. Wainwright*, 372 U.S. 335, 344 (1963).

A probation revocation hearing cannot, of course, re-examine the initial adjudication of guilt, which is the only stage of the proceedings against a defendant where counsel has a constitutional significance ("for his defense"). Moreover, a probation revocation hearing is not a criminal trial where the safeguards a defendant has in a criminal trial are available to protect against unwarranted revocation and incarceration. See *Morrissey vs. Brewer*, 405 U.S. 471, 480, 483 (1972); *McCaskey vs. State*, 589 So.2d 790, 791 (Ala. Crim. App. 1991). At probation revocation hearings the burden of proof standard is the reasonable satisfaction standard, not the beyond reasonable doubt standard. See *Powell vs. State*, 485 So.2d 379, 380 (Ala. 1986); see also, *Gagnon vs. Scarpelli, supra*, and *Morrissey vs. Brewer, supra*. The rules of evidence do not generally apply at probation revocation hearings and hearsay and other normally inadmissible evidence can be received. See Fed.R.Evid. 1101(d)(3); Ala.R.Crim.P. 27.6(d)(1); *Johnson vs. State*, 729 So.2d 897, 899 (Ala. Crim. App. 1997). At a probation revocation hearing illegally seized evidence may be admissible. See *United States vs. Brown*, 488 F.2d 94, 95 (5th Cir. 1973); *United States vs. Farmer*, 512 F.2d 160, 162 (6th Cir. 1975); *Ex Parte Caffie*, 516 So.2d 831, 833 (Ala. 1987); *Holcomb vs. State*, 644 So.2d 46, 47-48 (Ala. Crim. App. 1994). A probationer may be revoked for

committing another offense even though no conviction of the other offense has been obtained through the normal criminal trial process. See *Washington vs. State*, 577 So.2d 473, 474 (Ala. Crim. App. 1990); *Carlton vs. State*, 507 So.2d 998, 1002 (Ala. Crim. App. 1986). Evidence of statements by probationers made in violation of the *Miranda* rule have been held admissible in probation revocation hearings. See *United States vs. Johnson*, 455 F.2d 932, 933 (5th Cir. 1972); *Thompson vs. State*, 356 So.2d 757, 761 (Ala. Crim. App. 1978); *State vs. Fimbres*, 108 Ariz. 430, 501 P.2d 14, 16 (1972); *Commonwealth vs. Vincente*, 405 Mass. 278, 540 N.E.2d 669, 671 (1989).

Given these "weaknesses" of a probationer's position at a revocation hearing, which enhance the "practical possibility" of incarceration (see *Argersinger*, at 404 U.S. at 39), having counsel at a revocation hearing cannot be the equivalent of, or compensate for the lack of, counsel at trial where guilt was determined and where the "guiding hand", had it been available, may have avoided the conviction and/or suspended sentence which now mandates incarceration.

E. A pre-trial determination by a trial judge that no suspended sentence will be imposed as the penalty for a misdemeanor conviction can be made with the same facility that a determination can be made that no jail sentence will be imposed.

The *Argersinger* decision requires a judge trying a misdemeanor case where incarceration is an authorized penalty to engage in a pre-judging of the case because the judge must decide in advance of trial that no jail sentence

will be imposed if the right to counsel is not afforded. See 407 U.S. at 40. This process is somewhat of a venture into judicial clairvoyance because the judge must determine the appropriate penalty (or, at least, its upper limits) before trial. If the rule advocated by the Petitioner is adopted and judges in misdemeanor cases are permitted to sentence uncounseled defendants to suspended sentences and probation even greater clairvoyance will be required. To assure that *Argersinger's* requirements that no uncounseled defendant can be incarcerated is complied with the judge, it seems, will be required to know in advance of trial that an uncounseled defendant who receives a suspended sentence and probation will be able to successfully complete probation without revocation and incarceration. Otherwise, a suspended sentence and probation are mere hollow gestures that can never be enforced. See *United States vs. Reilley*, 948 F.2d 648, 654 (10th Cir. 1991). Such a rule thrusts upon a judge the task of precisely predicting the future. This is an impossible task, but a necessary one under the rule advocated by Petitioner if probation is to continue as a meaningful sanction in misdemeanor cases and uncounseled misdemeanor probationers are not to be incarcerated.

Requiring such an impossible determination or useless gesture seems grossly inappropriate as a step in applying a standard for guaranteeing the constitutional right to counsel and a fair trial and preventing unconstitutional deprivations of liberty. If a judge can, and is required to, make a pre-trial determination regarding incarceration as an appropriate penalty for a particular charged offense, and to afford counsel on the basis of that determination, as *Argersinger* now requires, there is no

reason the judge cannot extend that pre-trial determination and decide before trial whether a suspended sentence and probation (and possible deferred incarceration) is an appropriate penalty and afford counsel based on that determination.

IV. *ARGERSINGER VS. HAMLIN* AND *SCOTT VS. ILLINOIS* SHOULD BE OVERRULED TO THE EXTENT THAT THEY DENY APPLICATION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL TO MISDEMEANOR CASES WHERE IMPRISONMENT IS AN AUTHORIZED PENALTY.

In *Gideon vs. Wainwright*, 372 U.S. 335, 345 (1963) the Court recognized as unsound and reversed its earlier decision in *Betts vs. Brady*, 316 U.S. 455 (1942), which established the rule that whether a defendant has a right to counsel under the Sixth Amendment depends on a case-by-case analysis. 372 U.S. at 345. *Argersinger* and *Scott* effectively establish a case-by-case analysis rule for misdemeanor cases. They impose on a trial judge the responsibility in each misdemeanor case to determine whether the Sixth Amendment applies. And, most significantly, they require an analysis that easily can jeopardize the ability of a trial judge to fulfill the venerable role of a jurist in an independent and ordered judicial system. This hazard arises from *Argersinger's* direction to trial judges that they know in advance of trial whether a particular prosecution will merit imprisonment as a penalty and, armed with that knowledge, decide in advance of trial whether there is a right to counsel in the particular case. See 407 U.S. at 40. This, Petitioner submits, is a serious

flaw in the *Argersinger* and *Scott* decisions that, for the reasons discussed below, should be corrected.

The *Argersinger* opinion does not explain the process by which a trial judge is to obtain the information required to "have a measure of the seriousness and gravity of the offense" and "know when to name a lawyer" for a particular defendant in a particular case. If it is not to be made by whim, a correct determination about the appropriate penalty for a particular defendant in a particular case it seems would require the same kinds of information a judge would consider in sentencing after conviction. It is generally recognized that for purposes of sentencing judges have a right to, and must, acquire information from a multitude of sources (and are not restricted to legal evidence) in order to decide on an appropriate penalty. See, e.g., *Nichols vs. United States*, 511 U.S. 738, 747 (1994); *United States vs. Grayson*, 438 U.S. 41, 50 (1978). This would include such information as the nature of the defendant's conduct, the harm resulting from the defendant's conduct, the defendant's background and record, and the type of sanction best suited to promote deterrence as to the public and rehabilation as to the defendant.

Such information could be acquired by a trial judge in a number of ways, but there appear to be two general methods. One method would be by conducting an open, adversarial judicial hearing where evidence is presented under oath and the defendant is allowed to participate. Such a procedure, while assuring fairness and due process, hardly seems feasible. It could expend large amounts of judicial time and resources in an effort that has a limited purpose, or possibly no purpose. Such

information could be acquired by the judge from a private source. The most likely private source would be the prosecuting attorney or a law enforcement officer. Any private source (particularly the ones mentioned), it seems, presents insurmountable due process problems. Consequently, the *Argersinger* requirement leaves a trial judge on the horns of a dilemma as to how to properly carry it out.

Misdemeanor cases are typically tried without a jury. The judge is the trier of facts. In Alabama, for instance, all misdemeanor prosecutions not initiated by indictment and all prosecutions of municipal ordinance violations are tried before only a judge (although there is a right of appeal and trial de novo before a jury). See ALA. CODE §§ 12-12-3, 12-12-32(a), 12-12-70(b) (1975). Due process requires a fair trial in a fair tribunal. *Bracy vs. Gramsley*, 520 U.S. 899, 904 (1997). A fair tribunal is unlikely to exist where the judge and trier of fact is supplied unsworn information which is not tested by cross examination about the offense to be tried and about the defendant to be tried before the trial actually begins. See *In Re: Murchison*, 349 U.S. 133, 136-38 (1955). Moreover, the possession of such information might render a judge subject to disqualification under the Canons of Judicial Ethics as having personal knowledge of disputed evidentiary facts. See, e.g., ALA. CANONS OF JUDICIAL ETHICS 3C(1)(a).

The pre-trial determination a trial judge is required by *Argersinger* to make is antithetical to the role of the trial judge as an impartial trier of facts. This is true whether counsel is appointed or not appointed. The conduct of the defendant which is the basis of the charge, the defendant's background (including any criminal record),

and the harm done to any victim are obviously necessary considerations in making the required assessment about an appropriate penalty. Some of this information, particularly a defendant's record, would not likely be admissible evidence at trial. To be an impartial trier of facts it is obviously inappropriate that the judge, in advance of trial and before hearing the trial evidence and making a determination of guilt or innocence, have information, some of which may be highly prejudicial to the defendant (or the prosecution) and which, as a practical matter, it would be difficult or impossible for the judge to disregard in deciding guilt or innocence. See *In Re: Murchison, supra.* A judge who is informed of such matters in advance of trial cannot serve as an impartial trier of fact.

Further, making a pre-trial determination about the bounds of punishment for a particular case undermines the traditional judicial role in sentencing a defendant in the event of a conviction. Traditionally, judges exercise great discretion in determining the appropriate penalty for a particular offense and a particular defendant after hearing the trial evidence. See, e.g., *United States vs. Tucker*, 404 U.S. 443, 446 (1972); *Goolsby vs. State*, 283 Ala. 269, 270, 215 So.2d 602 (1968). If a sentencing judge has, in obedience to the requirements of *Argersinger*, made a determination in advance that no sentence of imprisonment will be imposed in a particular case the judge is, after conviction, powerless to impose imprisonment. This is true even if the facts developed at trial or by information secured in an orderly and proper way following conviction pursuant to a sentencing judge's inherent right, which were not known pre-trial, show the defendant's conduct or record was extremely egregious and

imprisonment is manifestly warranted for the particular defendant and the particular offense. Providing counsel for all offenses where incarceration is an authorized penalty will eliminate this derogation of inherent judicial power.

The Court should recognize these flaws in the *Argersinger* and *Scott* decisions, just as the Court in *Gideon vs. Wainwright* recognized the flaw in *Betts vs. Brady*. These flaws should be removed by overruling these decisions to the extent they infringe upon the proper and traditional role of a trial judge and by replacing them with a rule that is more philosophically consistent and more workable in practice. The obvious replacement, it seems, to the practice mandated by *Argersinger* is the rule rejected by the *Argersinger* and *Scott* decisions – that the right of counsel applies in all cases where imprisonment is an authorized penalty. Many states now follow this practice (See App. To Amici brief, pp. 1a-8a). This fact is an indication that experience has shown it to be a fairer and more workable arrangement.

V. A STRAIN ON PUBLIC RESOURCES DOES NOT JUSTIFY UNCOUNSELED MISDEMEANOR TRIALS WHICH RESULT IN DEPRIVATION OF LIBERTY.

The argument in the briefs of Petitioner and Amici that affording the right of counsel to misdemeanor defendants who receive suspended sentences should be denied because it will severely tax public resources is wrong in theory and on principle and unsupported factually.

The contention that assuring constitutional rights will impose a burden upon the public treasury is not a novel argument. It no doubt was raised in *Powell vs. Alabama*, 287 U.S. 45 (1932); *Gideon vs. Wainwright*, 372 U.S. 335 (1963); *Coleman vs. Alabama*, 399 U.S. 1 (1970); *Boyd vs. Dutton*, 405 U.S. 1 (1972); *Argersinger vs. Hamlin*, 407 U.S. 25 (1972); and *Moore vs. Illinois*, 434 U.S. 220 (1977). Obviously, the implementation of the decision in each of those cases has required the expenditure of additional public funds. As this Court pointed out in *Mayer vs. City of Chicago*, 404 U.S. 189, 197-98 (1971), a "State's fiscal interest is . . . irrelevant" where the denial of the constitutional rights of due process and equal protection are concerned. Constitutional rights cannot be sacrificed to the contention that they are expensive.

On the factual side, neither Petitioner nor Amici have undertaken to quantify what is described as a financial burden. Apparently affording counsel in cases such as the present case has not been financially unbearable in those jurisdictions which now do so. From the appendix to the brief of Amici it appears that probably half of the States would definitely have afforded counsel for a defendant in a case like the present case (where a jail sentence was authorized) and a large number of others would probably have done so (depending on the meaning of such phrases as "incarceration is likely", conviction is a "practical possibility", where the accused person may be "deprived of liberty", etc.). The concurring opinion of Justice Powell in *Scott vs. Illinois* pointed out that at the time that case was decided the law in at least 33 states (and possibly as many as 40) would have required counsel be afforded to a

defendant faced with a charge like the Respondent faced in this case. 440 U.S. at 388.

The argument that cost and convenience trump rights guaranteed by the Constitution should never be adopted as the law. That is essentially the argument the Petitioner and Amici are making. That argument, especially where not articulated quantatively, should be rejected as a reason for not affording the right of counsel in suspended sentence cases.

CONCLUSION

Respondent prays that the petition be denied and that the judgment of the Supreme Court of Alabama be affirmed.

Respectfully submitted,

WILLIAM H. MILLS
REDDEN, MILLS & CLARK
940 Regions Bank Building
417 North 20th Street
Birmingham, Alabama 35203
(205) 322-0457
Attorney for Respondent